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Surface and Depth: The EU's Resilient Sovereignty Question

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Abstract

The paper asserts the enduring significance of ‘sovereigntist’ thinking not just at the rhetorical surface of EU discourse, but as a deep organizing theme of its constitutional politics. It argues that the ‘sovereignty surplus’ of the EU—referring to the excess and overlapping quality of claims to sovereignty in the EU (i.e. that ultimate authority is claimed both for the supranational centre and for the member states) and to the competition over scarce legal, political and cultural capital that arise from the simultaneous pursuit of these claims—underscores the notorious ‘democratic deficit’ of the EU in three ways. The sovereignty surplus is, first of all, the deep cause of the democratic deficit, in that competition over sovereignty’s scarce symbolic and organizational capital frustrates the development of EU-wide democracy. Secondly, the very gravity and divisiveness of what is at stake for the various parties involved and for the positions implicated in the ‘sovereignty surplus’ renders the question of the proper diagnosis and treatment of the ensuing democratic deficit highly controversial and, indeed, sharply polarised. Thirdly and finally, and bringing us back to the recent controversy over the aborted EU Constitution, the sovereignty surplus also makes the question of praxis—of how to secure the very ground of initiative necessary to develop and act on a more inclusively resolved diagnosis and treatment of the democratic deficit—whatever that may be, difficult if not intractable. The paper concludes by arguing for the importance of keeping that last question on the legal and political agenda, even—indeed especially—in an age of constitutional fatigue.

Keywords

Sovereignty, constitutionalism, democratic deficit, EU, member states.

Surface and Depth: The EU's Resilient Sovereignty Question

1. The Surfaces of Sovereignty

In its modern guise the idea of sovereignty refers to a politically accomplished and legally recognized coincidence of people, territory and authority (Jellenik 1895). Its paradigm case has been the modern state, and indeed the modern system of states. Often described as the Westphalian system, the system of states is based upon a notion of mutual exclusivity—that each coincidence of people, territory and authority creates a holistic and self-contained unit whose sovereignty within its exclusive domain is respected by all other sovereign powers, just as, reciprocally, it respects the exclusive domain of these other sovereign powers.

Sovereignty, of course, has always been a highly stylized idea. The entire history of imperialism in its early colonial guise stands as a rebuke to sovereignty's claimed generality of application (Tully, 2008). And in countless ways the modern history of international relations, with its manifold asymmetrical power relations between states based upon inequalities of economic, military, political and legal capital, has continued to challenge the sovereignty perspective (Krasner, 1999). Yet in an important sense sovereignty has remained the premise of fundamental authority “that anchors our concept of modern politics.” (Jackson, 1999). It has done so on account of its key position as a framing category, and often an active “speech act” (Werner and De Wilde, 2001), utilized by key political and legal actors as a way of making sense of and arranging the world. That is to say, sovereignty and sovereignty-talk has been vital both *epistemically*—for the ideas it “condenses” (Turner, 1974) and the particular way of knowing the world it supplies, and also *symbolically* and *systemically*—for the sense of order it represents and reproduces.¹ On the one hand, sovereignty offers a form of shorthand for, and a convergent influence upon, a whole series of ideas, assumptions and expectations associated with statehood, publicness, collective action, identity, belonging, land, power, legitimate coercion, law and constitutionalism. And on the other hand, its very invocation—both the acting of legal and political players ‘as if’ sovereignty were the foundation of all authority and the expressive power attendant upon the articulation of sovereignty—have had many real and self-fulfilling consequences for the world, engendering a path-dependency in which those legal and political forces and relations that serve to renew the existing Westphalian frame are supported by the existing

¹ On the epistemic, symbolic and systemic dimensions of sovereignty, see Walker (2008b).

configuration of authority and those that serve not to do so instead encounter resistance from that existing configuration. In many respects, however, the EU over its first half-century has posed a sharper set of questions about the endurance of the sovereignty frame than any other contemporary development. In the European supranational theatre sovereignty has been turned on itself, so to speak. In the register of legal discourse in particular, on the basis not only of the key Treaty texts of the Union but also of the pioneering early case-law of the European Court of Justice,² ideas associated with sovereignty have played a large part in the challenge of the supranational order to the traditional authority of the state. The concepts of supremacy and primacy through which the authority of the supranational centre has been underwritten have been treated by many—both insiders and observers—as placeholders for or functional equivalents to a new supranational claim to sovereignty, backed up by supporting legal doctrines of direct effect, pre-emption, implied powers and Community-based fundamental rights (see e.g., de Witte 1999, de Búrca 2003). In the register of politics (both popular and academic) too, the remorselessly increasing range and depth of the powers of the European Union, dramatized in recent years not just by the pushing out of the economic and social agenda but also by the EU’s gradual encroachment on the traditional state-sovereigntist concerns of currency and internal and external security, have encouraged a strong sense of the erosion of state sovereignty and its replacement by a new multi-level power configuration (see e.g. Werner and de Wilde 2001, Cederman 2001, Marks *et al* 1996).

We shall have more to say about the terms of this supranational offensive in due course. Before we do so, however, we must anticipate an objection. This holds that the very success of the EU in challenging the state sovereignty paradigm raises an acute question about its ongoing relevance. If the EU in its developed state has so decisively cut itself off from the state-centred Westphalian moorings of the original Treaties of Paris (1951) and Rome (1957), perhaps there is little of value to be gained in continuing to draw upon the language of sovereignty to make sense of the most audacious postnational experiment of our contemporary age in its mature 21st century phase. This, indeed, is what the increasingly prevalent language of European “post-sovereignty” (See e.g. MacCormick, 1999, 2004; Bellamy 2003; Keating 2003; Menendez and Fossum, 2008) suggests. Just as, 20 years on, it might be considered to be a mere explanatory point of *departure* rather than one of *arrival* to describe the pre-1989 Warsaw Pact countries of Central and Eastern Europe as *post-Communist*, the message of the European post-sovereigntists is that sovereignty today

² In particular; Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR1; Case

remains important only as a mark of what the EU has left behind and not as a sign of where it now is or what it is moving towards. That is to say, the characterization of the EU in terms of sovereignty is one which remains significant in identifying an absence—in explaining what the entity is *not* like and how it no longer works, but one that has little or nothing positive to offer in identifying an alternative steering mechanism and explanatory key.

In turn, the debate about the resilient significance of sovereignty is closely connected to a broader discussion about the appropriate conceptual tools for making sense of the EU and its prospects. For there is clear meta-theoretical water between those who, in pursuit of this task, would continue to use the old state-centred concepts of political modernity, and those who would seek a new language for what they understand to be a quite *sui generis* phenomenon (see e.g. Shaw and Wiener 2000, Friese and Wagner 2002, Walker 2005). And as *the* foundation stone of the modernist state-centred approach, sovereignty would appear to be first in the firing-line for those who favour jettisoning the old. On this sceptical view, in summary, continuing preoccupation with the idea of sovereignty in the context of the EU is seen as no longer anything more than a merely superficial attraction, and therefore ultimately as something of a *distraction*. For sure, sovereignty continues to figure at the rhetorical surface of pronouncement and debate, often indeed prominent in official discourse, but arguably this sovereignty-talk is now so far behind the curve of objective development that it distorts more than it enlightens. Such a charge finds a most obvious target in legal discourse, and in the way in which the sharply opposing perspectives of some legal Europeanists and some legal nationalists find their basis in a common preoccupation with the language or guiding assumptions of sovereignty. Just as European lawyers have been quick—arguably too quick—to see the signs of a new mode and site of sovereignty in the self-assertiveness of the ECJ and other institutions, so successive generations of national constitutional lawyers, it seems, have remained in thrall to the question of national sovereignty, and in particular to how the constitutional integrity of that idea may be reconciled with the aggressive supranational encroachments of EU law. From the clash between national and supranational visions of fundamental right in the 1970s, through concerns about the loss of statehood after the significant increase in supranational powers precipitated by the Treaty of Maastricht in 1992 (Claes 2005) and the particular sovereignty-anxieties of the EU-acceding states of Central and Eastern Europe with still vivid memories of the Warsaw Pact in the early years of the new century (Sadurski, 2008), to the renewed concerns with central overreach triggered

6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

by the (abortive) Constitutional Treaty of 2005 and continued in the form of its replacement Lisbon Treaty,³ the spectre of ‘sovereignty lost’ has periodically resurfaced in national constitutional courts. But while this plays well to those themes of constitutional autonomy which emerged as such an integral part of the modern state complex and remains well suited to the juridical defence of the integrity of statehood, do state sovereigntist concerns not seem anachronistic when considered apart from that inherently conservative discursive context? Has legal-constitutional discourse not retained the form of absolute sovereignty long after its substance has escaped? And is this not also true of all those other rhetorical surfaces—including recent referenda debates over the failed Constitutional Treaty and the (eventually) successful successor Lisbon Treaty (Hobolt, 2009) and stylized national party political positions and oppositions over the quality, extent and limits of integration more generally, where the past-evocative language of sovereignty continues to sound loudly?

2. Sovereignty Surplus and Democratic Deficit

In what follows I try to provide an answer to this kind of scepticism. My argument is that the surface concern with sovereignty in legal and other discourse is not *merely* superficial, but continues to reflect certain deep structural features of the EU. In that respect, the power of the S-word is as resiliently important in the EU as it has been and it continues to be in countless other contexts of late political modernity in securing and expressing the latent power both of the state itself and of state-associated ideas. It serves both to frame and articulate certain concerns associated with the specific legal and political pedigree as well as the broader “social imaginary” (Taylor, 2004) of the state, and to ensure that such concerns feed into the ongoing institutional and ideational concerns of the EU. On the one hand, the role of sovereignty in this regard has been and continues to be a challenging one, sometimes even a destabilizing one, for the EU, posing more problems than it offers answers to the most developed supranational polity on the planet. On the other hand, just *because* of its expressive importance and organizing power, the concept of sovereignty must nevertheless figure in any solutions that are sought to the EU’s ongoing efforts to establish and sustain itself as a viable political community. In brief, the case for the resilient centrality of the

³ This idea of an ultimately ‘zero-sum’ relationship between German sovereignty and the development of the EU polity is a prevalent theme in the German Constitutional Court’s 2009 (affirmative) decision on the ratification of the Lisbon Treaty. Lisbon Case, BVerfG, 2 BvE 2/08, 30 June 2009, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html. See also D. Halberstam and C. Möllers (2009).

sovereignty *problématique* rests upon the argument that what we might term the longstanding ‘sovereignty surplus’ of the EU is closely and profoundly connected to the theme that lies at the resilient centre of the debate over the legitimacy of the EU. If, as Jürgen Habermas has insisted (see e.g., 2001a), *democracy*—the idea of collective self-legislation, that all affected by decisions bearing in any significant way on their life-chances should have a voice in these decisions—is the only political principle upon which we can all agree on in a ‘post-metaphysical’ age where there are no longer any pre-given moral certainties, then how might we reach that critical point in the life of an organization where its decisions achieve a weight and resonance which seems to require democratic validation yet where it continues to lack effective democratic institutions? And how should we address that situation if it does so arise? More specifically, given that the growth of the EU over its first half century means that it palpably and increasingly does make decisions that significantly bear upon the life-chances of its members, how do we explain and how should we address any institutional shortfall in its democratic arrangements? This is, of course, the hoary old problem of the EU’s so-called ‘democratic deficit’.

In what follows, I want to argue that the sovereignty surplus—which simply refers to the excess and overlapping quality of claims to sovereignty in the EU (i.e. that ultimate authority is claimed both for the supranational centre and for the member states) and to the competition over scarce legal, political and cultural capital that arise from the simultaneous pursuit of these claims—underscores the democratic deficit in three ways. The sovereignty surplus is, first of all, the deep cause of the democratic deficit. Secondly, the very gravity and divisiveness of what is at stake for the various parties involved and positions implicated in the sovereignty surplus renders the question of the proper diagnosis and treatment of the ensuing democratic deficit highly controversial and, indeed, sharply polarised. Thirdly and finally, and bringing us back to the recent constitutional controversy of the EU and its aftermath, the sovereignty surplus also makes the question of *praxis*—of how to secure the very ground of initiative necessary to develop and act on a more inclusively resolved diagnosis and treatment of the democratic deficit—whatever that may be, difficult if not intractable. So, to recap, with reference to the democratic deficit the sovereignty surplus is responsible for three aspects of the difficulty—the problem of *deep causes*, the problem of *diagnostic controversy*, and the problem of the ever-disappearing ground of *transformative initiative*.

3. The Nature of the Democratic Deficit

In order to appreciate how sovereignty is the deep cause of the democratic deficit, we must begin by briefly defining the latter term (Follesdal and Hix, 2006). The Democratic Deficit can be summed up alliteratively under the five ‘A’s.

3.1 *Alienation*—Most obviously, and notoriously, the growth of the EU involves a shift from nationally autonomous parliamentary power to pooled executive power at the EU level in the Council (of ministers) and in the European Council. This refers, then, to a two-stage movement—first an internal state movement from parliament to executive and, secondly, through the national executives acting in concert, a more general hollowing out of state democratic authority.

3.2 *Authority*—There is a democracy-diminishing and democracy-obscuring mixture of different forms of authority at EU level. The Commission (bureaucratic), Court of Justice and, increasingly, Court of First Instance, (judicial) and Council (executive), all assume key responsibilities some of which might in other polities fall within the remit of directly elected institutions. The EU’s own such directly-elected institution, the Parliament, has only a limited role in legislation. It does not propose new legislation and, at the disposal stage, depending on the policy area in question, it is either joint-legislator or merely a consulted party.

3.3 *Attention*—Few people pay attention to the European Parliament and the trend is a deteriorating one, with a record low turnout of 43% across the EU voting in the elections of 2009 following a previous record low of 45% in 2005. And those who do vote continue for the most part to treat these occasions as ‘second order’ national elections, a fact of which the very modest success and salience of the European-wide political parties is both a symptom and a cause.

3.4 *Abstraction*—The specific density and gravity of each individual vote may be too little and too light in an entity of almost 500 million people, making it the second most heavily populated polity with democratic pretensions or aspirations in the world (after India).

3.5 *Affinity*—This refers to the so-called ‘no-demos’ problem. (Weiler, 1999, ch. 10) Arguably, this is the deepest, and, unarguably, it is the most complex, predicament of supranational democracy. The ‘no-demos’ argument comes in different variants, but in its fullest version it is about both the ‘inputs’ and the ‘outputs’ of democracy (Scharpf, 1999) and the intimate connection between these. It asserts that there is a set of social preconditions to democracy (see e.g. Canovan, 1996; Miller 1995) which also, crucially, happen to be

amongst the most important benefits (re)produced and consolidated *by* democracy. It further claims that where these preconditions and benefits are non-existent or insufficiently present, as is presumptively the case in the post-national EU, then we struggle to contrive them into existence. At sociological root, what we are talking about is the existence or otherwise of a minimum level of ‘we-feeling’—wherever such a feeling may come from and however it may be constructed—that is required in order both to be able to put in place the mechanisms and to enjoy the advantages associated with democracy as a system of collective decision-making that pays equal basic concern to each of its member’s interests and preferences when coming to particular collective decisions. If we do not possess that threshold ‘we-feeling,’ then either the mechanisms of democratic decision-making will not be triggered or, even if they are, they are likely to remain empty promises. The relevant elements that in this ‘demos’ model are simultaneously dimensions of the we-feeling and benefits of democracy are four in number—let us then call them the ‘constituent goods’ of democracy in acknowledgment of their dual aspect as generative sources and standing features of the democratic ‘good’. First, without the relevant minimum sense of membership of a common political community, we may not afford others the kind of recognition and quality of *respect* consistent with treating them as political equals, and so may struggle to make or abide by common commitments. Secondly, and reciprocally, we may not *trust* others enough to be confident that they will respect and treat us as political equals, and so to abide by their binding common commitments. Thirdly, as an extension of this lack of mutual respect and trust, we may not be sufficiently invested in the idea of our long term common commitment to accept *sacrifices* in the name of some common good or the pressing particular interests of other constituencies within the community; we may, in other words, lack the motivation to offer or sustain “losers’ consent” (Anderson *et al*, 2005). And fourthly, we may not be confident enough of what we do possess or can possess in common so as to be able to make generous provision for and to accept means for respecting what we can also afford *not* to have in common, and which should therefore remain an area of *tolerable difference*. In sum, we may lack the trust, respect, solidarity and mutual sympathy that allow democracy to emerge and help it to work properly when it does emerge.

4. Sovereignty Surplus: The Deep Cause of the Democratic Deficit

If we turn now to the sovereignty dimension of our equation, in what sense does the surplus of sovereignty provide the deep cause of the democratic deficit? Sovereignty in its modern

sense, as we have already noted, refers to the idea of a full political and legal coincidence of people, territory and authority. As a framing idea of global relations, sovereign statehood, as we have also noted, does not require and never has required empirical perfection. That is to say, it does not require that authority is *in fact* monopolized in discrete territorial populations, but just that states should retain a plausible claim to be and to remain the *predominant* authority over their own territory and population in an everyday sense, as well as the ultimate authority *in extremis*, and that the logic of this arrangement be respected not only in internal state relations but also in the mutual exclusivity of the sovereignty claim between states (Walker, 2003). The development of the EU threatens both of these ideas—both the everyday pre-eminence of the state as the source of authority across the plenitude of policy sectors in a particular territory and over a particular population—call this *substantive* sovereignty—and the final claim to ultimate authority in circumstances of challenge—call this the categorical *form* of sovereignty. As the recently abandoned Constitutional Treaty would have made explicit in its competence catalogue, but as has in any case long been taken for granted within the Treaty system, the EU has shared competence over many policy sectors once monopolized by the states and, indeed, exclusive competence over a few key areas such as the common commercial policy and economic and monetary union. Accordingly, the substantive sovereignty of the states has long been subject to erosion. What is more, as also already noted, under the effective tutelage of the European Court of Justice this challenge of substance has from an early stage been underpinned by a more categorical challenge, through legal claims of supremacy and direct effect, and more generally, through its confident pursuit of “small-‘c’” (Walker, 2006) constitutional self-definition and self-sufficiency. In combination these claims question whether the states retain even last-analysis sovereignty to impose their will (or, indeed, to recover the competence and capacity to do so). The net effect of these challenges to the substance and very form of state sovereignty is that sovereignty is progressively understood as split and spread around in a quite unprecedented manner. It no longer persuasively rests only with the states considered separately. Conversely, it is not best conceived as merely redistributed in a mixed or multi-layered or federal ‘system’ for the states in combination, for that would still imply a single ‘superstate-like’ final authority for the system in question and an overarching principle or rule for deciding the hierarchy of norms within that system. In other words, it would assume that all the problems could be ‘domesticated’ as questions of divided power contained within an unquestionably statist or state-like frame. Equally, however, *contra* the post-sovereignists, sovereignty cannot be assumed to have simply disappeared in the conceptual space between these two polar

possibilities, transformed into a modality of legal or political power that knows no particular source of origin (whether state or superstate) nor boundary of jurisdiction (whether state or superstate); for that would fail to explain the continuing insistence and resonance of sovereignty-talk at these different sites. Rather, as the so-called constitutional pluralists would argue (see e.g. Walker, 2002; 2003, Maduro, 2003, Kumm 2005), sovereignty is more persuasively conceived not as redundant but as discretely located in each of these various overlapping polity sites, none of whom will defer to the other and so concede the absoluteness and exclusivity of the claim of the other, and whose relations *inter se* are for that reason finally heterarchical rather than hierarchical.⁴

This new sovereignty configuration, crucially, also has reverberations beyond the legal realm. If the claim to autonomous polity status which announces or reflects the legal claim to sovereignty is split and spread between different polity sites, this means, presumptively at least, is that the need for democracy is also split and spread around in the trail of these new sites of sovereignty. But here the ‘no demos’ problem abruptly intrudes. To put it mildly, and in an agnostic and empirically contingent way, there can be no guarantees that the institutional means and cultural resources necessary for democracy will be sufficiently abundant and sufficiently flexible and mobile to meet the spreading need. Or to put it strongly and in a categorical way, just as sovereignty under the state system was based on a logic of exclusivity, the bonds and commitments that make democracy viable may also operate on the basis of a logic of exclusivity and thus become simply inconceivable at a plurality of levels simultaneously, and so at levels and places beyond the state. Whether in the mild or strong version, therefore, the surplus of sovereignty claims tends towards a deficit of democracy.

5. Sovereignty and the Diagnostic Controversy

Let us now turn to the second way in which the sovereignty surplus underpins the democratic deficit. This concerns how the importance and divisiveness of what is at stake in the diagnosis and treatment of the democratic deficit is informed and compounded by the

⁴ Clearly there are many other positions in the literature (legal and otherwise) which are similar to that of the constitutional pluralists inasmuch as they see an enduring tension between the various nation state centres of gravity and the supranational complex as a key defining feature of the EU’s power structure and relations, although they would not use the language of constitutional pluralism. For example, Habermas’s influential work on the development of a European social and constitutional identity as a counterpoint and complement to that of the member states fall within this category. See e.g. Habermas (2001b).

sovereignty surplus, and in particular, by the way in which that surplus allows different versions of the sovereign configuration of the EU to emerge and to compete. For we can identify a variety of different approaches to the democratic deficit, each of which may flow from different premises, and may, furthermore, lead to different conclusions as regards the proper allocation of sovereign power. For the sake of simplicity, we may reduce these approaches, some of which we have already referred to in passing, to six somewhat stylized variants. These can sometimes be combined, but some variants, as we will see, are also quite clearly incompatible and so mutually exclusive. In expounding these various positions and noting their strengths and vulnerabilities, we will again make use of an alliterative device, referring to the six ‘D’s.

5.1 Denial—This is the view which cleaves to the traditional conception of state sovereignty. It has both an empirical and a counterfactual variant. The empirical variant holds, or more likely simply assumes, that nothing of much import has changed in the Westphalian grid system, and that, contrary to many views, even after 50 years the work of the EU remains mundane and—at least in high political terms—inconsequential, and so the threshold norm of democratic significance at the EU level has been reached barely or not at all. The counterfactual variant, in contrast, does not deny that the EU has been responsible for change of sovereignty-shifting dimensions, but does deny that anything of value would be lost in terms of the allocation of authority to the appropriate polity site by simply rewinding to an early age and divesting the EU of power sufficiently to return all democracy-engaging authority to the state. To the considerable extent that, despite their refusal to give due recognition to the impact made by the EU (in the empirical variant) or the impact that would be lost by the EU’s reduction or removal (in the counterfactual variant) both denial views still exist—as they do in the Eurosceptical strains of nationalism (see e.g. Holmes, 1998)—this is simply decayed or nostalgic thinking, although no less powerful for that.

5.2. Delegation—This approach, which is sometimes accompanied by some measure of denial, holds that the problem of democratic reach and accountability can or should be taken care of through a mechanism of delegation—of national principal and supranational agent. (Moravcsik, 2005; Lindseth, 2002) But the actual institutional conditions of the EU stretch our sense of the plausibility of this. In particular, the paradigmatic supranational decision rules of unanimity and Qualified Majority Voting, the best gatekeeping argument for the principal-agent characterization *prior* to supranational initiatives, becomes the strongest

objection to any robust thesis of ongoing principal control *after* such initiatives have taken place, as they have now done progressively over half a century (Scharpf, 1999).

5.3. Demarcation—This is based on the idea that, whether we view it as necessary and inevitable or as contingent and avoidable, we can represent the democratic deficit as a virtue rather than a vice, since the core areas of EU's activity are just those that we should in any case cordon off and insulate from democratic passions and preferences. Two major sub-options have presented themselves here, each of which has been extremely influential in the history of EU integration. First, there is the ordo-liberal tradition, which asks for the basic structure of market-making and market-enhancing 'four freedoms' and competition law to be protected from EU-level legislative and executive interference concerned with particular socio-economic interests—an activity that should instead be left to member states. (Mestmacker, 1994) Secondly, there is the perspective which views the EU as a so-called 'regulatory state' (Majone, 2005). In contrast to the ordo-liberal approach, it is recognized that the EU does and should get involved beyond its core market-making activity, but still not in key distributive questions or questions of deep value difference. Rather, the domain and style of 'positive integration' measures at the EU level should be restricted to precise matters of risk regulation in areas such as environmental or product standards. These should be left to experts and administrators concerned with protecting and finessing the Pareto-optimal solutions available on the basis of the general wealth enhancement of an expanded European market, rather than becoming the play of partisan political forces.

While the demarcation approaches rightly remind us that not all of political decision-making can or should be subject to democratic will formation, they fail to the extent that they overstate the propensity and the capacity of the EU to stay clear of everyday distributive 'winner and loser' politics that *do* require democratic will formation. This is most obviously true of the ordo-liberal tradition, which is unable to cope with any type of market-correcting European re-regulation in areas of socially relevant standards or processes—from food safety to health advertising to labour market discrimination. But it is also true of the regulatory state approach, to the extent that it is prepared to rely on disinterested expertise in such re-regulation in a way that ignores two things. First, it ignores the pervasiveness of win-lose situations, where decisions which may be of general public good and of benefit to everyone (e.g. food safety, environmental protection) nevertheless create sharp secondary divisions between winners and losers in the cycle of production, exchange and circulation—producers versus consumers, workers versus capital investors, domestic versus foreign customers etc.

And secondly, it ignores the extent to which European-wide jurisdiction, even when not itself concerned with large distributive choices, can in the name of what it is primarily concerned with and competent over, namely market-making and regulatory forms of market-correction, create a decision-making gap by undermining the economic or legal capacity of states to undertake their own democratically responsive distributive policies (Scharpf, 1999).

Economically, this would, for example, embrace the need for states to keep direct taxes down in order not to put off mobile capital investment. Legally, this would, for example, include the side-effects of monetary union—carried out in the name of removing market inefficiency born of fluctuating exchange rates—in removing domestic mechanisms for influencing domestic public revenue such as currency devaluation; equally, it would include the prohibition on grounds of competitive equality of forms of preferential or compensatory distributive treatment to particular constituencies such as regional or sectoral subsidies, or the strategic use of public procurement to favour particular constituencies, or the employment buffers of subsidized public sector industries.

5.4 Disaggregation—Here democracy becomes an adjective rather than a noun—a mobile virtue of particular arrangements in domains or policy communities of discrete practical engagement where people have the knowledge and motivation to put things in common, rather than a holistic virtue of the large community of the ‘demos’. What we need, on this view, is not mass ballot-box democracy with its attendant large-scale and broad-brush preference formation, allocation and weighing, but a multiplicity of finely grained engagements of knowledgeable and mutually responsive constituencies aimed at providing context-specific optimizations of the common good. And if we look closely enough, we can find just such contexts in abundance in the EU across many different policy areas and mediated through such deliberative mechanisms as Comitology (Joerges and Neyer 1997, Joerges 2006) and the Open Method of Co-ordination. (Sabel and Zeitlin, 2008)

But there is a level of analysis problem here. Democracy can indeed be disaggregated, and often does its best work in local micro-contexts. However, unless we are prepared to say that there are no mutual effects or ‘externalities’ between these discrete policy areas and communities which need trans-contextual evaluation; that there is and should be no broader conception of the public interest (distributive fairness, equal rights protection etc) which guides individual sectoral choices rather than merely emerging as their cumulative and serendipitous effect; and that underpinning these other concerns, there is either no need for or no threat to the constitutive public goods of trust, respect, solidarity and

mutual tolerance in the disaggregated approach, then there is something lacking in that approach if taken in isolation. In particular, it is in danger of disregarding the twofold nature of the ‘demos’ problem we discussed earlier—that it represents a shorthand for those constitutive goods—equal respect, trust, solidarity and mutual tolerance—which by their input not only make the broader democratic framework possible, but are also among its greatest virtues and outputs. So the fact that we find an alternative route—or series of criss-crossing routes in order to make democratic practice possible at disaggregated sites despite the absence of these constitutive goods at the input stage—only addresses one half of the problem. It can do nothing to cure or compensate for the absence of these constitutive goods as outputs of the democratic process.

5.5 Displacement—This is the inverse of denial. If sovereignty and the sense of democratic authority that flows from sovereignty are fated to be unitary-in-the-last-instance, then perhaps we should fast-forward to EU democracy and leave behind state democracy as outmoded or, at least, as now subordinate. Similarly to its Eurosceptic opposite, the fact that this strong Eurofederalist view (see e.g. Mancini, 1998) is held implicitly much more than it is expressed explicitly, that it considers nothing of value to be lost by the redundancy of an autonomous conception of nation state polity and democracy, and that it rests on unlikely assumptions about the readiness of the forces of social and political transformation, does not make it any less powerful for that.

5.6. Dualism—This is the view which holds that we need not endorse either the state-centric or the Euro-centric, unitary-sovereigntist view of the deniers and delegators on the one hand and the displacers on the other. Equally, we should not be satisfied by the democracy-diminishing view of the demarcation approach—often itself tending towards a closet vision of European-centred unitary sovereignty—or by the view of the disaggregator, which tries to oppose a polity-monolithic logic and the ideas of holistic democracy and sovereignty which accompany that logic. Rather, on the dualist view, we can have a dual or multi-level democracy with each level holistic and demos-presupposing in its own terms.

In principle, this promises the most attractively ‘pro-democratic’ solution to the problem to the extent that it does not allow democracy under emergent conditions of plural sovereignty to be defeated by the assumptions of the unitary sovereigntist frame—neither forcing it backwards into a statist mould nor fast-forwarding it into a superstatist mould, nor side-stepping the issue by narrowly demarcating or disaggregating democracy’s virtues at whichever site. Yet this approach would be of no value if it simply presented its diagnosis

and abstract resolution of the problem as sufficient to its attainment, so ignoring the resilience of the very unitary sovereigntist frame it seeks to overcome. Rather, the dualist model has to face up to and overcome the abiding challenges of this frame, which, in conclusion, are threefold.

6. Sovereignty and the Blocked Polity

The first is the *structural* challenge. Does the idea of holistic democracy—with the associated virtues of respect, trust, solidarity and mutual tolerance, not after all, as the state and superstate unitarians alike hold, simply possess a strong and perhaps exclusive ‘elective affinity’ with the structural idea of unitary sovereignty? The short, empirically tried and tested answer would be no—that federal and devolved and other pluri-national and pluri-community systems show us many examples of the accommodation of multi-level democratic loyalties. Indeed, the possibility of secure communal living in a number of the federalized or devolved states that make up the EU itself—including the UK, Belgium and Spain—depends on this being so. So why should the EU system be any different, especially given the significant long-term institution-constructive work that has gone into developing the European Parliament as a support and forum for the wider level of European democracy? But the federal analogy rather begs the question. This is so because a key remaining difference lies precisely in these examples all being of state-framed systems. Accordingly, the division of powers and even of demos-creating cultural identities occurs *within* the context of a single last-analysis sovereignty. Is the same kind of accommodation possible in a multi-sovereign, territorially and jurisdictionally overlapping configuration such as the EU, which does not subserve to a singular discipline of internal hierarchy and system-integrity, and where identities and loyalties are not nested within one overall system supplying both the ordering mechanism and inter-cultural traditions for managing and resolving these issues?

In turn, the scale of this first challenge refocuses a second *cultural* challenge. This is no longer about the possibility in principle of split-level holistic democratic commitments, but about the conduciveness of the social backdrop to the realization of that possibility. In particular, how do we nurture the necessary dual sense of loyalty in such unfavourable structural and ideological circumstances? These are circumstances often dominated, or at least distorted and shadowed by the contradictory extremes of unitary sovereignty and democracy at state and supranational level; or, in more minor key, characterized by the institutionalized prevalence of solutions of the demarcators and disaggregators that also tend

to exclude or marginalize any dualist way for robust democracy at the European level. This puzzle brings us, finally, to the most profound significance of the recent constitutional debate, and also to its protracted tribulations and uneasy aftermath. Quite apart from any of its particular provisions geared towards the institutional design and relations of the European Council, Council of Ministers, Commission and Parliament or its substantive adjustments and extensions of the competence of the EU, and arguably more importantly than any of these, the constitutional project could be seen as pursuing the very idea of “dual legitimacy” (Giscard D’Estaing, 2003) based on a dual democratic foundation, frame and expression, as a way of harnessing the sovereignty surplus to overcome the democratic deficit. Basically, the Constitutional Treaty sought to do this in two ways. First, at the procedural level, it supplied a mechanism to replace the purely intergovernmental and so resiliently state sovereigntist default model for considering major reform and resolving major disagreements within the Union. That new mechanism was the Constitutional Convention, with a membership drawn for the first time from EU institutions as well as national ones. Could such a broader forum supply a decision-making matrix in which the positions underpinning the various different and incompatible diagnoses and treatment of the democratic deficit problem were placed in mutual engagement without any one position being privileged, so removing or easing some of the negotiating impediments to the kind of inclusive solution represented by dualism? Secondly, at the expressive level, would the powerful mobilization effect of the constitutional process itself (in particular, the Convention phase) and the more general symbolism of common constitutional commitment (as opposed to mere Treaty agreement) supply an independent stimulus to the strengthening of holistic democracy at the secondary supranational level?

In the event, such hopes ran aground upon the third and final problem of sovereignty surplus and a third, *practical* challenge to the idea of dualist democracy. Crucially, the present structural frame of sovereignty—and in particular the retention of the basic international treaty principle of the requirement of unanimous state consent or ‘common accord’ at the conclusive legal stage beyond the initial inclusive Constitutional Convention agreement—continued to provide a necessary, *and so presumptively disabling*, condition of initiative of any constitutional solution seeking to unblock the problem of democratic deficit, which, as we have seen, is itself largely a product of the very same structure of unitary sovereignty. This condition of initiative was ‘presumptively disabling’ because the bottom-line, last-analysis requirement of state unanimity was always likely to allow the unitary state sovereigntist view to reassert itself. And so, indeed, it proved to be, with the referendum ‘no’

votes on ratification of the final Treaty text in France and the Netherlands in the spring of 2005 enough to undermine the whole project. Moreover, that this was followed two years later by the formal burial of the Constitutional Treaty and its substantive relaunch in the form of “not the Constitutional Treaty” (Walker, 2008) of Lisbon, itself finally implemented at the end of 2009, has merely served to reinforce the argument about practical impediment. For crucially, the new Treaty lacked both the procedural openness and the transformative symbolic solemnity of its Constitutional predecessor, and was successful in the hands of the representatives of state sovereignty precisely *because* it lacked just those procedural and symbolic elements which would have posed the greatest threat to the default power base of the unitary state sovereigntist position. We should not, however, set this story in too harsh a light. The very fact that a Constitutional project was attempted is arguably just as important as its failure in what it says about the changing relationship between sovereignty form and democratic content. The structural, cultural and practical impediments to the transformation of the configuration of relations of sovereignty and democracy in a dualist direction remain, and were significant enough to frustrate reform in the reform cycle just completed. But they were not so significant that they prevented the initiative from being taken in the first place, and indeed making significant progress. And since the combination of sovereignty surplus and democratic deficit that generated the pressures out of which the constitutional initiative emerged have not gone away, pressure may build again towards a new constitutional initiative—or its functional equivalent in procedurally and expressively transformative terms, at some point in the future. Whether, when, and on what terms such a process may begin and may succeed remains to be seen. It is a topic, I suspect, not just for the next few years, but for the second half-century of European integration. What can be said in anticipation, however, is that the only genuine hope for Europe to overcome its longstanding democratic deficit lies in the enduring attraction and potentially self-reinforcing strength of the democratic ideal itself. In particular, this depends upon continuing appreciation and stubborn pursuit of the possibility that while, as we have seen, any particular grounded system of democratic *practice* is unable to specify its own ‘who decides what’ framework conditions in a democratic fashion and must always rely on a prior ‘sovereign’ frame to answer this question, the democratic *principle* of self-government need not be the docile prisoner of that frame and can instead rise above its context. In so doing, in supranational Europe, just as we have often required of them and continue to ask of them elsewhere in contexts both traditional and new, the closely twinned notions of ‘sovereignty’ and ‘democracy’ can provide an ongoing basis of self-critique and an iterative force for self-transformation (Benhabib, 2006). As has often

been the case throughout the history of supranational Europe, the forms and outcome of that self-transformation cannot be entirely predictable, and may lead in unprecedented directions and to novel institutional arrangements to match the complex field of practices and negotiated regulation of a non-unitary post-hierarchical polity (see e.g. Tully, 2008, ch8; Wiener 2008). But we should not for that reason treat these most basic ideas of the age of political modernity as redundant in navigating the passage to a new age.

Bibliography

- C.J. Anderson, A. Blais, S. Bowler, T. Donovan and O. Listhaug (eds) (2005) *Losers' Consent* New York: OUP.
- R. Bellamy (2003) "Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU" in N. Walker (ed) *Sovereignty in Transition* Oxford: Hart 167-190.
- S. Benhabib (2006) *Another Cosmopolitanism* New York: OUP.
- M. Canovan (1996) *Nationhood and Political Theory* Cheltenham: Edward Elgar.
- L E Cederman (2001) "Nationalism and Bounded Integration: What would it take to construct a European Demos" 7 *European Journal of International Relations* 139-74.
- M. Claes (2005) *The National Courts' Mandate in the European Constitution* Oxford Hart.
- G. de Búrca (2003) "Sovereignty and the Supremacy Doctrine of the European Court of Justice" in N. Walker (ed) *Sovereignty in Transition* Oxford: Hart 449-460.
- B. de Witte (1999) "Direct Effect, Supremacy and the Nature of the Legal Order" in P. Craig and G. de Búrca (eds) *The Evolution of EU Law* 262-307.
- A. Follesdal and S. Hix, (2006) "Why there is a democratic deficit in the EU: A Reply to Majone and Moravcsik" 44 *Journal of Common Market Studies* 533-562.
- H. Friese and P. Wagner (2002) "Survey Article: The Nascent Political Philosophy of the European Polity" 10 *The Journal of Political Philosophy* 342.
- V. Giscard d'Estaing (2003) "The Convention and the Future of Europe: Issues and Goals" 1 *International Journal of Constitutional Law* 346.
- J. Habermas (2001a) "Constitutional Democracy—A Paradoxical Union of Contradictory Principles?" 29 *Political Theory* 766-781.
- J. Habermas (2001b) "Why Europe Needs A Constitution" 11 *New Left Review* (Sep.-Oct.).
- D. Halberstam and C. Möllers (2009) *The German Constitutional Court says "Ja zu Deutschland!"* 10(8) *German Law Journal*
- S. B. Hobolt (2009) *Europe in Question; Referendums on European Integration* Oxford: OUP.
- M. Holmes (ed) (1998) *The Eurosceptical Reader* Basingstoke: Palgrave Macmillan,
- R. Jackson (1999) "Introduction: Sovereignty at the Millennium" 47 *Political Studies* 423.

- G. Jellinek, (1895) *The Declaration of the Rights of Man and the Citizen* New York: Henry Holt (trans. 1901)
- C. Joerges and J. Neyer (1997) "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology", 3 *European Law Journal* 273.
- C. Joerges (2006) "Deliberative Political Processes Revisited: What Have We Learnt About the Legitimacy of Supranational Decision-Making" 44 *Journal of Common Market Studies* 779-802.
- M. Keating (2003) "Sovereignty and Plurinational Democracy: Problems in Political Science" in N. Walker (ed) *Sovereignty in Transition* Oxford: Hart 191-208.
- S. Krasner (1999) *Sovereignty: Organised Hypocrisy* Princeton: Princeton University Press.
- M. Kumm (2005) "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty" 11 *European Law Journal* 262-307.
- P. Lindseth, (2002) "Delegation is Dead, Long Live Delegation; Managing the Democratic Disconnect in the European Market Polity" in C. Joerges and R. Dehousse (eds) *Global Governance in Europe's Integrated Market* Oxford: OUP 139-63.
- D. N. MacCormick (1999) *Questioning Sovereignty* Oxford: OUP.
- D. N. MacCormick (2004) "Questioning Post-Sovereignty" 29 *European Law Review* 852-63.
- M. Maduro (2003) "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. Walker (Ed) *Sovereignty in Transition* Oxford: Hart, 501-538.
- G. Majone (2005) *Dilemmas of European Integration* Oxford: OUP.
- F. Mancini (1998) "Europe: The Case for Statehood" 4 *European Law Journal* 29-42.
- G. Marks, L. Hooghe and K. Blank (1996) "European Integration since the 1980s: State-Centric versus Multi-Level Governance" 34 *Journal of Common Market Studies* 343-378.
- A.J. Menendez and J. E. Fossum (eds) (2008) *The Post-Sovereign Constellation: Law and Democracy in D.N. MacCormick's Legal and Political Theory* Arena Report 4/08 Oslo Arena.
- E-J Mestmacker, (1994) "On the Legitimacy of European Law" (1994) *RechtsZ* 615.
- D. Miller (1995) *On Nationality* Oxford OUP.
- A. Moravcsik, (2005) "The European Constitutional Compromise and the Neofunctionalist Legacy" (2005) 12 *Journal of European Public Policy* 349-386.

- C. F. Sabel and J. Zeitlin (2008) "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union" 13 *European Law Journal* 309-342.
- W. Sadurski (2008) "Solange, chapter 3': Constitutional Courts in Central Europe—Democracy—European Union" 14 *European Law Journal* 1-35.
- F. Scharpf (1999) *Governing in Europe? Effective and Democratic?* Oxford: OUP.
- P. Schmitter (1996) "Imagining the Future of the Euro-Polity with the Help of New Concepts". In Marks, G., Scharpf, F.W., Schmitter, P. C. and Streeck, W (Eds) *Governance in the European Union* London: Sage 121-165.
- J. Shaw and A. Wiener (2000) "The Paradox of the 'European Polity'" in M Green Cowles and M Smith (Eds) *The State of the European Union: Vol. 5.* 64-89.
- C. Taylor (2004) *Modern Social Imaginaries* Durham: Duke University Press.
- J. Tully (2008) *Public Philosophy in a New Key Volume II. Imperialism and Civic Freedom* Oxford: OUP
- V. Turner (1974) *Dramas, Fields and Metaphors: Symbolic Action in Human Society* Ithaca: Cornell University Press.
- N. Walker (2002) 'The Idea of Constitutional Pluralism' 65 *Modern Law Review* 317-359.
- N. Walker (2003) "Late Sovereignty in the European Union" in N. Walker (ed) *Sovereignty in Transition* Oxford: Hart, 3-30.
- N. Walker (2005) "Legal Theory and the European Union: A 25th Anniversary Essay" 25 *Oxford Journal of Legal Studies* 581-601
- N. Walker (2006) 'A Constitutional Reckoning' 13 *Constellations* 140-150.
- N. Walker (2008a) "Not the European Constitution" 15 *Maastricht Journal of European and Comparative Law* 135-141.
- N. Walker (2008b) "The Variety of Sovereignty" in R. Adler-Nissen and T. Gammeltoft-Hansen (Eds) *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* New York: Palgrave 21-32
- J.H.H. Weiler (1999) *The Constitution of Europe* Cambridge: Cambridge University Press.
- W.G. Werner and J.H. De Wilde "The Endurance of Sovereignty" (2001) 7 *European Journal of International Relations* 283-313.
- A. Wiener (2008) *The Invisible Constitution of Politics* Cambridge: Cambridge University Press.